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# State v. Johnston Respondent's Brief Dckt. 44481

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44481
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2014-9356
	)	
TRISTAN ARLIN JOHNSTON,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Johnston failed to establish that the district court abused its discretion by revoking his probation and ordering executed his concurrent unified sentences of 10 years, with two years fixed, imposed following his guilty pleas to three counts of rape?

Johnston Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Between December 2013 and March 2014, 18-year-old Johnston had sexual

intercourse with 14-year-old S.S. “at least five (5) times.” (PSI, p.4.<sup>1</sup>) In June 2014, 15-year-old C.V. reported that Johnston “forced her to have sexual intercourse with him.” (PSI, p.4.) When officers interview Johnston, he admitted that he had sexual intercourse with S.S. and C.V., and also with 15-year-old S.K. (PSI, p.4.) He further admitted that, when he was 17 years old, he had sexual intercourse with S.W., who “was in ninth grade.” (PSI, p.4.) At the conclusion of the interview, officers told Johnston that “if he initiated anything with any other girls under the age of eighteen (18), he would be taken to jail.” (PSI, p.4.)

Ten days later, Johnston went to his 17-year-old friend, Jack’s house, where he “hung out” and smoked marijuana with Jack, a 12-year-old girl, and a 14-year-old girl. (PSI, p.4.) The following day, Johnston, Jack, and the 14-year-old girl “got high on mushrooms.” (PSI, pp.4-5.) Two days after that, the 14- and 12-year-old girls “snuck out” and met Johnston and Jack at Jack’s house, where “they all smoked marijuana together” and Johnston ““was all over”” the 14-year-old girl, who admitted that she and Johnston had “kissed passionately.” (PSI, p.5.)

The state charged Johnston with four counts of lewd conduct with a minor under 16. (R., pp.33-35.) Pursuant to a plea agreement, Johnston pled guilty to three (amended) counts of rape and the state agreed to recommend concurrent unified sentences of 10 years, with two years fixed, with a period of retained jurisdiction. (R., pp.43-45.) The district court imposed concurrent unified sentence of 10 years, with two

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file “Johnston 44481 psi.pdf.”

years fixed, suspended the sentences, and placed Johnston on supervised probation for 10 years. (R., pp.58-64.)

Less than nine months later, Johnston's probation officer filed a report of violation alleging that Johnston had violated the conditions of his probation by consuming alcohol, engaging in a sexual relationship with a female who was "supposedly" 18 years old without authorization, violating his curfew on several occasions, using his cell phone to send and/or receive text and picture messages in violation of his sex offender agreement and having photos of two different "young women" on his cell phone, frequenting the Meridian Public Pool without permission, having contact with a minor female (C.C.) whom he met at the Meridian Public Pool, sending text messages to C.C. that were "romantic in nature" and in which Johnston and C.C. were "talking about 'being horny,'" and failing to disclose his "romantic interest" in/relationship with C.C. (he later admitted that he wanted to "safe date" her) to his probation officer and sex offender treatment provider and to obtain approval before entering into the relationship. (R., pp.95-99.) Johnston admitted that he violated the conditions of his probation by consuming alcohol, sending and/or receiving text and picture messages, frequenting unapproved places where minors congregate, and engaging in a sexual relationship without permission. (R., pp.92-93, 107.) The district court revoked Johnston's probation, ordered the underlying sentences executed, and retained jurisdiction. (R., pp.109-12.) Following the period of retained jurisdiction, the district court again suspended Johnston's sentences and placed him on supervised probation for 10 years. (R., pp.115-19.)

Less than two months later, Johnston entered a Walmart “with the intention of stealing three phone cases” – one “for him, another for his brother’s girlfriend, and the third was for his girlfriend/female friend.” (R., p.145.) He “knew which phone models each of these people had” and “selected phone cases to match,” concealed the phone cases “down the front of his pants,” and exited the Walmart, “not making any attempt to purchase any merchandise.” (R., p.145.) Johnston’s probation officer subsequently filed a second report of violation, alleging that Johnston had violated the conditions of his probation by being arrested and charged with the new crimes of burglary and petit theft. (R., pp.137-38.) Johnston admitted that he violated the conditions of his probation by committing the new crime of petit theft and the district court revoked Johnston’s probation and ordered his underlying sentences executed. (R., pp.135, 159, 163-65.) Johnston filed a notice of appeal timely from the district court’s order revoking probation and ordering his underlying sentences executed. (R., pp.173-75.)

Johnston asserts that the district court abused its discretion when it revoked his probation and ordered his underlying sentences executed in light of his substance abuse and *possible* mental health issues.<sup>2</sup> (Appellant’s brief, pp.5-6.) Johnston has failed to establish an abuse of discretion.

“Probation is a matter left to the sound discretion of the court.” I.C. § 19-2601(4). The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v.

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<sup>2</sup> The psychological evaluator diagnosed Johnston with “Malingering,” reporting that Johnston “failed to cooperate by over reporting and exaggerating symptoms of psychological problems” and that “Johnston may have a mental health issue, but unfortunately, no conclusions can be drawn due to unreliable and inconsistent information.” (PSI, pp.268-69.)

Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider “whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society.” Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Contrary to Johnston’s assertions on appeal, the record supports the district court’s determination that Johnston was no longer a suitable candidate for probation, particularly in light of Johnston’s ongoing criminal behavior and disregard for the terms of community supervision, his poor performance in the retained jurisdiction program, his high risk to reoffend, and his failure to demonstrate adequate rehabilitative progress while in the community. With respect to the instant offenses, Johnston admitted that he repeatedly engaged in sexual intercourse with two different 14-year-old girls, and that he also had sexual intercourse with a 15-year-old girl, as well as with a girl who “he knew was in the ninth grade.” (PSI, pp.4, 25-26.) He acknowledged that he was aware of the girls’ ages, but had sexual intercourse with them nonetheless, and that he “did not use a condom when he had sex with these girls ... and several of the girls tested positive for Chlamydia.” (PSI, p.4.) Even after Johnston was interviewed by the police and instructed not to initiate “anything with any other girls under the age of 18,” Johnston completely disregarded the warning and, less than two weeks later, he resumed his inappropriate associations with underage girls, using illegal drugs with 12- and 14-year old girls and engaging in sexual conduct with the 14-year-old. (PSI, pp.4-5.)

At the time of sentencing, it was determined that Johnston presented a moderate risk to reoffend both overall and sexually. (PSI, pp.12, 19.) Despite having victimized

multiple minor girls over a relatively short period of time, Johnston stated that he “did not perceive himself to be a sexual offender,” that he “did not believe he was in need of sexual offender treatment,” and that “because he perceived himself to have a low sex drive, he believed sexual offender treatment would reduce his sex drive to a nonexistent level.” (PSI, pp.24, 34.) He demonstrated no real remorse, claimed he did not “remember engaging in sexual acts with the victims,” attempted to justify his behavior, and blamed the victims and his alcohol abuse for his sexual misconduct. (PSI, pp.11, 16, 24.) Furthermore, despite claiming that alcohol was the cause of his criminal behavior, Johnston stated that he did not feel he had an alcohol or substance abuse problem and indicated “no/minimal” motivation for treatment.” (PSI, pp.10-11, 28, 231.) The psychosexual evaluator reported that “there were concerns regarding [Johnston’s] likelihood to abide by the conditions of supervision because of his minimization of his sexual offense, antisocial personality characteristics, narcissistic personality characteristics, and impulse control issues,” and recommended that treatment take place in a structured environment. (PSI, p.20.) Instead, the district court placed Johnston on probation. (R., pp.58-64.)

Johnston did not perform well on probation. He consumed alcohol, disregarded his curfew, and violated the terms of his sexual offender agreement by engaging in a sexual relationship with a female who was “supposedly” 18 years old without authorization, frequenting places where minors congregate without permission, intentionally having contact and texting/communicating with a minor female with whom he wished to have a romantic and/or sexual relationship, and failing to disclose his “romantic interest” in/relationship with the minor female to his probation officer and sex

offender treatment provider or to obtain their approval before entering into the relationship. (R., pp.95-99.) Johnston's probation officer also reported that there had "been issues" with Johnston's "attendance and participation" in sex offender treatment, advising that Johnston had "been missing appointments regularly for the past several months." (R., p.99.) Johnston's probation officer concluded:

The Defendant's actions have shown that he does not take the conditions of the Court seriously. The Defendant has shown that he is willing to violate the rules of supervision and also that he is willing to possibly create new victims. The Defendant has frequented locations where minors congregate and has possibly created a new victim while being on supervision. The Defendant has shown with his actions that he is not willing or able to control his deviancy and that he is possibly not a valid candidate for community supervision at this time.

(R., p.99.)

The district court subsequently placed Johnston in the retained jurisdiction program, during which Johnston "appeared more motivated to squander his time through immature behavior choices, including horseplay and lack of responsible action toward completing and understanding assignments." (R., pp.109-12; PSI, p.282.) He "constantly produce[ed] assignments that did not meet expectations" and provided "feedback which generally lacked meaningfulness." (PSI, p.282.) Johnston also developed a habit of "blatantly stealing commissary," and ultimately received a DOR after doing so "on several occasions." (PSI, p.289.) NICI staff reported that Johnston's response to being caught stealing "was concerning," noting that he "initially denied this behavior" and was "evasive about the truth," and that, although he "later began to selectively remember," he was "never able to fully take responsibility." (PSI, pp.279, 282, 289.) NICI staff advised that Johnston's "ability to break rules, through various justifications, has not changed much since his previous probationary period. Mr.



Johnston still progressed into theft from initially being given commissary, to then asking for it, to then simply taking it without asking, which also indicates some serious problems with social influence and boundaries.” (PSI, p.282.)

At the jurisdictional review hearing, the state recommended that the district court relinquish jurisdiction; however, the district court opted to grant Johnston a second opportunity to successfully complete a period of supervised probation. (R., pp.114-19.) Less than two months later, Johnston violated his probation by continuing his theft behavior, committing the new crimes of burglary and petit theft. (R., pp.137-38, 145.) He subsequently underwent a psychological evaluation, and the evaluator ultimately concluded that Johnston presented a “high risk for committing a violent crime in the future” and that Johnston’s risk of sexually reoffending had increased to high risk. (PSI, pp.19, 271.)

At the disposition hearing for Johnston’s second probation violation, the state argued:

... [T]his Court has tried really hard with this defendant because of his young age when he first came before the Court. At this point I think everything has been exhausted from the State’s perspective. Even at the time of the rider, we were asking for relinquishment because it didn’t seem like he had done nearly as well as he should.

Each time he has come back before the Court he continues to say, well, like the first time, jail was an eye opener and then it was the rider was an eye opener. He is scared and he doesn’t want to go to prison. And then we’re right back out here. And then it is kind of almost like in this crime it is so senseless. It was such a stupid thing to do. ... And it was almost like he wants to show off and be the bad guy. And so I’m not sure what other than relinquishment or imposition that the State can recommend.

(Tr., p.10, L.13 – p.11, L.8.) Johnston’s counsel acknowledged, “Obviously community-based supervision has not been successful” (Tr., p.11, Ls.17-18), and stated, “I honestly

don't really know what we do with him at this point" (Tr., p.11, Ls.11-13). The district court subsequently concluded:

Well, I initially placed you on probation although there had been a recommendation for a rider because it seemed possible that you being on probation might allow you to address some of the issues that you had. Not that much later you came before the Court again for probation violation disposition, I gave you a rider. And you did not do a brilliant job on your rider and I gave you [a] chance at that point. You were out less than two months and committed a new theft that for no particular reason except looks like to impress people by committing thefts.

You don't belong on probation. If this is how you handle probation then you don't get probation. I am revoking probation. Imposing sentence. You get credit for time served. But there are consequences if you keep committing crimes on your own when you are on probation. You have been given chances before and you have blown it off. There are consequences for that.

(Tr., p.15, Ls.5-24.)

The district court considered all of the relevant information and appropriately concluded that Johnston was no longer a suitable candidate for community supervision. Johnston's continued criminal offending and unwillingness to abide by the terms of probation demonstrate Johnston's failure to rehabilitate and his continued danger to society. Given any reasonable view of the facts, Johnston has failed to establish that the district court abused its discretion by revoking his probation and ordering his underlying sentences executed.

Conclusion

The state respectfully requests this Court to affirm the district court's order revoking Johnston's probation and ordering his underlying sentences executed.

DATED this 21st day of February, 2017.

\_\_\_\_\_  
/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of February, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

\_\_\_\_\_  
/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General